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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-30

JAMES L. FORNARO,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI
TO THE CRIMINAL COURT OF BALTIMORE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS B. BURCH,
Attorney General of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
GEORGE A. EICHHORN,
Assistant Attorney General
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737
Attorneys for Respondent.

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PRELIMINARY COMMENTS

This Brief in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

Petitioner was found guilty on March 29, 1973, in the District Court in Baltimore City of exhibiting uncensored films in violation of Maryland Code, Article 66A, Section 19(b). Petitioner was fined $100 and sentenced to thirty days imprisonment and he appealed the con-

viction to the Criminal Court of Baltimore City. Thereupon, on January 9, 1974, Judge Anselm Sodaro upheld the guilty finding in the District Court but suspended the thirty day sentence and reimposed the $100 fine. Petitioner applied for certiorari to the Maryland Court of Special Appeals, and the petition was denied without comment on March 7, 1974. Thereupon, Petitioner applied to the Maryland Court of Appeals, and on April 29, 1974, that Honorable Court denied the Petition for Writ of Certiorari for the reason that "there has been no showing that review by certiorari is desirable and in the public interest". A copy of the Order of the Court of Appeals denying certiorari has been set out in Appendix "A" in Petitioner's brief.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of Title 28 of the United States Code, Section 1257.

QUESTIONS PRESENTED[1]

I. Whether or not the charging document was sufficient to charge Petitioner of the crime of which he was convicted?

II. Whether or not the prohibitions of Maryland Code Article 66A, Section 19(b), are vague and over-broad, so as to unduly restrict Petitioner's First Amendment Right to freedom of expression?

III. Whether or not the films in question were properly seized pursuant to a valid search and seizure warrant so as to be admissible against Petitioner in the proceedings below?

[1]Although Petitioner has listed some ten questions, Respondent has couched all of Petitioner's questions in terms of the three questions listed in this Brief in Opposition to Petition for Writ of Certiorari.

STATUTES INVOLVED

Petitioner contends that the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution are involved. Petitioner also maintains that Article 66A, of the Maryland Code is involved.

STATEMENT OF THE CASE

As is set out under "Opinions Below," *supra*, Petitioner was found guilty on March 29, 1973, in the District Court in Baltimore City of exhibiting uncensored films in violation of Maryland Code, Article 66A, Section 19(b). Petitioner was fined $100.00 and sentenced to thirty days imprisonment. On appeal to the Criminal Court of Baltimore, Judge Anselm Sodaro made the same guilty finding, suspended the thirty day sentence and reimposed the $100 fine.

As is also under "Opinions Below", *supra*, both the Maryland Court of Special Appeals and the Maryland Court of Appeals have denied Petitioner's Writs of Certiorari to those respective courts.

STATEMENT OF FACTS

The evidence presented at the District Court level and on appeal in the Criminal Court of Baltimore City showed that on March 13, 1973, armed with a search and seizure warrant, Baltimore City police detectives went to 407 East Baltimore Street. The officers entered the premises at 2:25 P.M. and observed Petitioner behind an outer door, which he, upon being shown the search and seizure warrant, activated and opened by means of a buzzer device. The officers then executed the warrant and viewed and seized some fourteen films, none of which contained the Maryland Censor Board seal, and none of which had been approved by the Maryland Board of Censors.

ARGUMENTS

I.

THE CHARGING DOCUMENT WAS SUFFICIENT TO CHARGE PETITIONER OF THE CRIME OF WHICH HE WAS CONVICTED.

Petitioner challenges the sufficiency of the charging documents. (See Appendix C of Petitioner's brief). Respondent submits that in this question (as with all three questions presented by Petitioner) no substantial federal question has been presented (Supreme Court Rule 19), nor has Petitioner shown a conflict between existing Maryland law and existing constitutional law as enunciated by this Honorable Court. Therefore, this question, and the other three questions, are not properly reviewable by way of certiorari to the Supreme Court of the United States.

Notwithstanding this, Respondent would argue the following. The form of charging documents, such as that involved in the present case, is established in Maryland District Rules 706(e). The Petitioner's objections to the charging document seemed to revolve around requirement (2): "A plain, concise, and definite statement of essential facts constituting each offense charged, and each formal charge placed against the defendant". Petitioner states that the present charging document does not contain sufficient information to "provide probable cause", that there is not sufficient probable cause to allow the arrest of the Petitioner, that the document is insufficient on its face and that it fails to allege a crime with sufficient particularity (including the title and designation of the particular motion picture film which is being charged against the Petitioner).

The present statement of charges, signed by Detective Harry Starkey, and at the bottom by the Judicial Officer contains all the necessary clerical information,

contains a clear description of the Petitioner sufficient to identify him (Rule 706(e)(1)) and all of the other matters required by rule. Insofar as the requirement of subparagraph (2) of Rule 706, the Petitioner is charged as follows:

> "(1) Exhibiting motion picture films for hire to the public without showing on the screen the statement of license of the Maryland Censor Board on or about 13 March '73. Article 66A Sec. 22. (2) Did unlawfully exhibit motion picture films for hire to the public at premises 407 E. Baltimore Street without either prior approval or a statement of license for the showing of said films having been obtained from the Maryland State Censor Board. Article 66A Sec. 19(b)."

Since the arrest of the Petitioner proceeded upon the execution of a valid search and seizure warrant, Respondent fails to understand the Petitioner's desire to have probable cause stated in the statement of charges. It is difficult to see what purpose that would serve.

If we hold the charging document to the same standard as an indictment in terms of information to the Petitioner of the commission of the crime, Respondent submits that this charging document is plainly sufficient. The form and content of indictments is governed by Rule 712 of the Maryland Rules of Procedure as follows:

> "(a) An indictment shall contain a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged. It need not contain any other matter not necessary to such statement, nor need it negative an exception, excuse or proviso contained in a statute creating or defining the offense charged. An allegation made in one count may be incorporated by reference in another count. An unnecessary allegation may be disregarded as sur-

> plusage and on motion of the defendant may be stricken from the indictment by the court."

In interpretation of the requirement of a "plain, concise and definite statement of the essential facts constituting the specific offense", it is sufficient if the offense is charged in equivalent words or words of the same import as those contained in the definition of the crime as stated in the statute. *Baker v. State*, 6 Md. App. 148, 250 A.2d 677 (1969). The essential purpose to be kept in mind in charging a defendant with criminal conduct "is twofold, that is the charge must so characterize the crime and describe the particular offense 'as to put the accused on notice of what he is called upon to defend and to prevent a future prosecution for the same offense'. *Gray v. State*, [216 Md. 410, 415, 140 A.2d 643 (1958)]." *Lank v. State*, 219 Md. 433, 436, 149 A.2d 367 (1959).

Maryland Code, Article 66A, Section 19(b) provides as follows:

> "Any person who shall sell, lease, lend, exhibit or use any film in this State without having first secured approval thereof and a license therefor in accordance with the procedure set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a court, shall be sentenced to pay a fine of not less than fifty ($50.00) dollars nor more than one hundred ($100.00) dollars or to imprisonment for not more than thirty (30) days, or to be both fined and imprisoned in the discretion of the court. Except, no employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theater which shows motion pictures, shall be subject to prosecution under this section if the employee is not an officer thereof and has no financial interest therein other than receiving salary and wages."

The elements of this crime are simple: the exhibition of a film without having first obtained approval of and a license from the Maryland State Board of Censors. The case of *Sanza v. Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967) adds a further requirement: that is that the exhibition be a public one and for a commercial purpose. It will be noted that Section 19(b) also contains a specific statutory exception for certain classes of employees of motion picture theaters. This exception, however, is not properly in an indictment and ought form no part of the statement of charges (Rule 712(a) — "nor need it negative an exception"). Thus to have placed the words to the exception in the charge would have resulted in surplusage which could have been stricken on the motion of the Petitioner; and thus it is somewhat absurd for him to now complain about that which he could have had stricken as improper. As to the remainder of the charge, however, it is clear that it is sufficient. The charge states that the Petitioner "unlawfully" exhibited the motion picture films "for hire to the public" and that he did not obtain prior approval or the license from the Maryland State Board of Censors. The charge also states the address at which the offense occurred. Thus the charge contains all of the elements of Section 19(b) and contains as well the further elements required by *Sanza, supra*. The charging document further contains the offense date as March 13, 1973, and the time as 2:25 p.m. on that date. All of that information clearly informs the Petitioner as to the specific crime for which he is charged, and it is clear that Petitioner could not be again put in jeopardy for the same offense due to the particularity of the detail contained in the statement of charges.

The following quotation from *Hamling v. United States*, ___ U.S. ___, 94 S. Ct. 2887 (1974), at page 2907, is particularly applicable:

> "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" (Citing, *inter alia, United States v. Carll,* 105 U.S. 611 (1882).)

The basic purpose of the charging document as stated in *Hamling, supra and Lank v. State, supra,* having been met, then it is sufficient.

II.

THE PROHIBITIONS OF MARYLAND CODE, ARTICLE 66A, SECTION 19(b) ARE NOT VAGUE AND OVER-BROAD SO AS TO UNDULY RESTRICT PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF EXPRESSION.

Petitioner argues that the Maryland licensing statute (Article 66A) is void for vagueness and is over-broad, citing *Freedman v. Md.,* 380 U.S. 51 (1965). His contentions are adequately disposed of in the recent case, decided October 29, 1974, *Star v. Preller,* ___ U.S. ___, 43 Law Week 3253. There this Honorable Court affirmed the judgment of the United States District Court for the District of Maryland which concluded that the defects identified in *Freedman* had been remedied by the present licensing statute. Respondent would again emphasize that there is no substantial federal question here involved, nor is there a conflict between the application of Maryland law and existing constitutional law.

III.

THE FILMS IN QUESTION WERE PROPERLY SEIZED PURSUANT TO A VALID SEARCH AND SEIZURE WARRANT AND THEREFORE WERE ADMISSIBLE AGAINST THE PETITIONER BELOW.

Petitioner maintains that the warrant was issued for contraband and not "as evidence of a crime" and that the seizure was thus in contravention of the First Amendment to the United States Constitution. Respondent would merely point to the warrant itself, which points out that the films being displayed in the machines "is in violation of the laws of Maryland" and Respondent would submit that the mere fact that the films had not been approved by the Maryland Censor Board, as was stipulated below, would give the police sufficient probable cause to seize the materials as the crime was in violation of Article 66A, Section 19(b), which provides in pertinent part as follows:

> "Any person who shall sell, lease, lend, exhibit or use any film in this State without having first secured approval thereof and a license therefor in accordance with the procedure set forth in subsection (a) above, shall be guilty of a misdemeanor . . . ." (Exception not applicable.)

In the instant case it is interesting to note that the evidence produced in the Criminal Court below showed that the films seized from booths 1, 2 and 3 contained no obscene or even sexual material whatsoever. This is just the point. The fact that the films had not been submitted to the Maryland Board of Censors for approval, coupled with the fact that they were being shown in the booths, is sufficient to give the police reason to seize the materials without a prior adversary hearing. See *Star v. Preller, supra,* and 352 F. Supp. 530 (same case, D. Ct. Md. 1972). In that case the U.S. District Court of

Maryland held that the requirements of the Maryland Board of Censors (Article 66A) does not constitute an "end run" around the pre-seizure hearing requirement as stated in *Adler v. Pomerleau,* 313 F. Supp. 277 (D. Md. 1970). The Supreme Court vacated the judgment in the *Star* case, so that the three-judge panel which had originally heard the case could consider it in light of *Miller v. California,* 93 S. Ct. 2607 (1973) and the other cases decided on June 21, 1973. It is clear, however, from the obscenity cases decided on June 25, 1973 *(Heller v. New York,* 93 S. Ct. 2789; *Alexander v. Virginia,* 93 S. Ct. 2803; *Roaden v. Kentucky,* 93 S. Ct. 2716) that the rule stated in *Quantity v. Kansas,* 378 U.S. 205 (1964) and *Marcus v. Search Warrant,* 367 U.S. 717 (1961) is to be applied only where the items are (1) presumptively protected by the First Amendment, and (2) seized for their alleged obscenity. Although Respondent has no difficulty in the present case in pointing out the films seized in the instant case are presumptively protected matter, it is clear that they were seized for the violation of Article 66A, a licensing statute, and not for their alleged obscenity. See also *Modern Social Education, Inc. v. Preller,* 353 F. Supp. 173, 182 (D. Md. 1973).

Petitioner also contends that the warrant was a general one and permitted selective enforcement by the officers executing same in that they could seize licensed as well as unlicensed film. Respondent submits that the affidavit and warrant were clear that the police could only seize those films being displayed in coin-operated machines which did not have a Maryland Censor Board seal on them. Additionally, the warrant limits the seizure to those films which are being "displayed", indicating that films which may have been stored on a shelf would not have been subject to seizure. Article 66A, Section 22 indicates that any approved film must

contain a seal on it. Section 19(b) of Article 66A prohibits the showing of a film without having obtained prior approval from the Maryland Board of Censors. Hence, the warrant was specifically limited and clearly told the executing officers that they could only seize films which were being displayed in the machines, which films did not have the Censor Board seals on them.

Again, Petitioner has shown no substantial federal question, nor has he shown a conflict between Maryland law and constitutional law as espoused by this Honorable Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Criminal Court of Baltimore should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
Chief, Criminal Division,
GEORGE A. EICHHORN,
Assistant Attorney General
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737
Attorneys for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of December, 1974, I served a copy of Brief in Opposition to Petition for Writ of Certiorari in the above entitled case, by depositing same in the United States mail, postage prepaid, to

William E. Seekford, Esq.
Suite 507, 102 West Pennsylvania Avenue
Towson, Maryland 21204
counsel for Petitioner.

GEORGE A. EICHHORN,
Assistant Attorney General.